Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ALLEN Z. WOLFSON	)
Petitioner,	)
v.	)
UNITED STATES OF AMERICA	)
Respondent,	)

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

I. Did the District Court Improperly Admit Evidence of Petitioner's Prior Convictions, Thereby Violating Petitioner's Constitutional and Legal Rights to a Fair Trial and Due Process of Law under the Fifth Amendment, for Purposes of a Section 2255 Habeas Corpus Motion?

II. Was the Petitioner Deprived of Effective Assistance of Counsel in Violation of Petitioner's Sixth Amendment Rights, Which is Proper Grounds for Granting Petitioner's Section 2255 Habeas Corpus Motion?

INTERESTED PARTIES TO THE PROCEEDING

1. Douglas N. Frazier
   United States Attorney

2. W. Christian Hoyer
   Former Special Assistant United States Attorney

3. Robert Mackenzie
   Former counsel for petitioner

4. The Honorable Ralph Nimmons
   United States District Court Judge

5. Frank Ragano
   Former counsel for petitioner

6. Judy Rice
   Former Assistant United States Attorney

7. Edmund W. Searby
   Assistant United States Attorney
   Counsel for the United States

8. Linda J. McNamara
   Assistant United States Attorney
   Reviewing appellate counsel for United States

9. Charles R. Wilson
   United States Magistrate Judge

10. Allen Z. Wolfson
    Petitioner

11. The Honorable R. Lanier Anderson, III
    United States Court of Appeals for the Eleventh Circuit Judge

12. The Honorable Susan H. Black
United States Court of Appeals for the Eleventh Circuit Judge

13. The Honorable Frank M. Johnson, Jr.
United States Court of Appeals for the Eleventh Circuit Senior Judge

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OPINIONS BELOW

On March 17, 1978, Petitioner was convicted in Florida state court of conspiracy under Florida Statute §833.04 (repealed July 1, 1975) of violating §659.53(1) and §659.55 (bank fraud and conspiracy to commit bank fraud), and was convicted of aiding and abetting a violation of the same.

On January 27, 1983, Petitioner was convicted of one count of conspiracy to commit mail fraud (18 U.S.C. §1341) and two counts of interstate transportation of fraudulently taken

funds (18 U.S.C. §2314) and was sentenced to five years confinement. The trial court decision of the United States District Court for the Middle District Court for Tampa, Florida (Case No. 82-68-Cr-T-13) was not reported. The sentence was reduced on August 28, 1984, to the time already served, plus five years probation.

Petitioner appealed his conviction, which the United States Court of Appeals for the Fourteenth Circuit affirmed without opinion. United States v. Wolfson, 729 F.2d 780 (11th Cir. 1984), cert. denied, 488 U.S. 846 (1984).

On July 11, 1988, Petitioner filed a Section 2255 Motion, but no action was ever taken by the Court. On October 13, 1992, Petitioner filed a Motion to Compel Adjudication on Petitioner's Section 2255 Motion.

On October 22, 1992, Petitioner's Section 2255 Motion was denied by the district court after a Magistrate's Report and Recommendation recommended denial on October 6, 1992.

On February 19, 1993, Petitioner filed an appeal of the denial of Petitioner's Section 2255 Habeas Corpus petition to the United States Court of Appeals for the Eleventh Circuit.

The United States Court of Appeals for the Eleventh Circuit affirmed the denial of Petitioner's Section 2255 Habeas Corpus Motion on March 4, 1994 without a hearing or opinion. (Case No. 92-3127).

STATEMENT OF JURISDICTION

Petitioner Allen Z. Wolfson appeals the decision of the District Court for the Middle District of Florida which was subsequently affirmed by the United States Court of Appeals for the Eleventh Circuit.

Title 28 U.S.C. §1254(1) provides that this Court shall have jurisdiction over all decisions of the Courts of Appeals of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional provisions, statutes, and federal rules are controlling in this action: U.S. Const. amends. V & VI; 28 U.S.C. §2255; 18 U.S.C. §§1341, 2314, 3282; Federal Rules of Evidence (28 U.S.C.) Rules 403, 404; Section 2255 Rules (28 U.S.C.) Rules 7, 8; and Florida Statutes Annotated §§833.04, 777.04, 659.53, 659.55.

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. §2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * * *

18 U.S.C.§1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious

coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §2314

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; * * *
Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. §3282

* * * [N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment * * * is

instituted within five years next after such offense shall have been committed. * * *

Federal Rules of Evidence, Rule 403, 28 U.S.C.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rules of Evidence, Rule 404, 28 U.S.C.

* * * *

(b) Other crimes, wrongs, or acts, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rules Governing §2255 Cases, Rule 7, 28 U.S.C. (following 28 U.S.C. §2255)

(a) Direction for expansion. If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and

answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

Rules Governing §2255 Cases, Rule 8, 28 U.S.C. (following 28 U.S.C. §2255)

(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

* * * *

44 Fla. Stat. Ann. §833.04 (1974) [Repealed by Laws 1974, c. 74-383, § 66,eff. July 1, 1975. (See §777.04)]

If two or more persons shall agree, conspire, combine, or confederate to commit any other felony they shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, & §775.084.

44 Fla. Stat. Ann. §777.04

(3) Whoever agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy and shall, when no express provision is made by law for the punishment of such conspiracy, be punished as provided in subsection (4).

(4) * * * *

(d) If the offense attempted, solicited, or conspired to is a felony of the third degree, the person convicted is guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

44 Fla. Stat. Ann. §659.53 (1975) [Repealed by Laws 1976, c. 76-168, § 3, eff. July 1, 1980 (See §11.61)]

> Any director, officer, or employee of a bank or trust company who asks for or receives, consents or agrees to receive a commission, emolument or gratuity or any money, property or things of value for his own personal benefit, or of personal advantage or endeavoring to procure for any person any loan from such bank or trust company or the purchase or discount of any note, draft, check, bill of exchange or other obligation by such bank or trust company, or for permitting any person to overdraft any account with such bank shall be guilty of a felony.

44 Fla. Stat. Ann. §659.53 (1975) [Renumbered as 658.78 by Laws 1980, c. 80-260, §101]

> Any person responsible for an act or omission expressly declared to be unlawful or a criminal offense by this code shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083, or, if the act or omission was intended to defraud, of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084.

STATEMENT OF THE CASE

Petitioner and his Co-Defendant at trial, Ralph Monroe, entered into negotiations to purchase the Morristown and Erie Railroad (M&E), a privately owned railroad. On February 5, 1976, a letter was mailed to M&E discussing the purchase of the railroad, which was signed by Petitioner as Chairman of the Board of Technology Transfer, Ltd. This letter constituted the fraud for which Petitioner was charged. The prosecutor alleged that the fraud was perpetrated in that the Petitioner was not Chairman of the Board of Technology Transfer, Ltd., at the time of the mailing of the letter. In fact, at the time of the

alleged illegalities, Petitioner was not nor had been an officer or director of the corporation from which the alleged fraud and conspiracy arose.

In 1982, Petitioner was indicted for conspiracy to commit mail fraud in violation of 18 U.S.C. §371 and interstate transportation of fraudulently taken funds in violation of 18 U.S.C. §2314. The basis for federal jurisdiction in the district court was pursuant to 28 U.S.C. §1331. Petitioner hired Frank Ragano to represent him in the matter. Mr. Ragano was inflammatory towards the jury and failed to raise key defensive arguments, particularly that the applicable statute of limitations barred the conviction of the Petitioner, as well as not mentioning the fact that Petitioner was not an officer or director of the corporation.

On January 27, 1983, Petitioner was convicted of conspiracy to commit mail fraud and interstate transportation of fraudulently taken funds. R1-135. Petitioner timely filed several motions pursuant to 28 U.S.C. §2255. Petitioner argued that the district court unfairly admitted certain evidence of prior convictions which had not yet been finalized, were misstated as "felonies" when they were only "misdemeanors," and were highly prejudicial to the Petitioner. Petitioner further argued that his counsel, Mr. Ragano, had failed to meet the minimum requirements of a professional standard of advocacy by failing to assert a valid statute of limitations claim that would have barred his conviction, and also that Mr. Ragano was demonstrably inflammatory towards the jury causing unfair prejudice against the Petitioner. R1-135.

The government countered that Petitioner's claims were not cognizable in a Section 2255 proceeding and should be summarily dismissed. R1-166-2. The United States Magistrate Judge then issued a Report and Recommendation advising the court to deny Petitioner's motion. R1-176. On October 23, 1992, the district court adopted the Report and Recommendation and denied Petitioner's motion without a hearing. R1-177.

Petitioner appealed his denied motion to the United States Court of Appeals for the Eleventh Circuit. Petitioner claimed that his constitutional rights to a fair trial, due process of law, and effective assistance of counsel had been violated. On March 4, 1994, the Court of Appeals for the Eleventh Circuit affirmed the decision of the district court without a hearing. Petitioner now respectfully urges this Court to grant certiorari and consider the merits of his claims.

ARGUMENT

I. The District Court Improperly Admitted Evidence of Petitioner's Prior Convictions Resulting in a Violation of Petitioner's Constitutional and Legal Rights for Purposes of a Section 2255 Habeas Corpus Motion.

Section 2255 of Title 28 of the United States Code provides two grounds, *inter alia*, that grant a court the authority to vacate a prisoner's sentence. These are: (1) that "the sentence was imposed in violation of the Constitution or laws of the United States," or (2) that the sentence is otherwise "subject to collateral attack." 28 U.S.C. §2255 (1988); see United States v. Jordan, 915 F.2d 622, 625 (11th Cir. 1990), cert. denied, 499 U.S. 979 (1991). "For a collateral attack under §2255, 'a distinction is drawn between constitutional . . . errors on the one hand, and mere errors of law on the other.'" United States v. Pierce, 959 F.2d 1297, 1300-01 (5th Cir. 1992) (quoting United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A 1981), cert. denied, 113 S. Ct. 621 (1992). The district court's admission of the Petitioner's prior state convictions clearly violates the Petitioner's constitutional rights to a fair trial, due process of law under the Fifth Amendment, and the express and implicit meanings of 404(b) of the Federal Rules of Evidence. U.S. Const. amend. V; Fed. R. Evid. 404(b).

Petitioner claims that the admission of prior convictions, which the trial court allowed despite the fact that Petitioner did not testify or place his character at issue, constitutes prejudicial error under United States v. Sardelli. 813 F.2d 654 (5th Cir. 1987). In Sardelli, the court held that admission of evidence regarding other crimes and indictments against the defendant constituted prejudicial error by the district court since such evidence was unduly prejudicial. Id.

While the Report and Recommendation of the Magistrate rejects Petitioner's claim of improper admission of evidence due to the alleged noncognizability of this claim under a Section 2255 motion, the Petitioner's constitutional rights have been

violated, thereby meeting the standards of Section 2255 and relevant judicial interpretations thereof. 28 U.S.C. §2255. The Report and Recommendation cites to Houser v. United States, 508 F.2d 509 (8th Cir. 1974) as support for the proposition that Petitioner's claim is not cognizable under Section 2255 because it does not meet the "otherwise subject to collateral attack" exception. Although Houser lists several grounds which are not judicially cognizable under Section 2255, the court notes that this list is merely a "quick reference" set forth with the full knowledge that these decisions are not etched in stone. Id. at 513. The court further states that "any decision which allows or refuses collateral attack rests upon a choice between achieving finality and assuring substantial justice in each case. . . . However, the Supreme Court has made it clear that in making this choice, the principal of finality is not entitled to any great weight." Id.

With respect to claims based on the "violation of the Constitution or laws of the United States," the Houser court stated that the appropriate standard for cognizability is whether "the claimed error was 'a fundamental defect which inherently results in a complete miscarriage of justice.'" Id. The Houser court further stated that:

> Although the foregoing discussion may indicate a hesitance to disturb the finality of a conviction, the courts do not consider collateral attacks when the allegations, if proved, would be a denial or infringement of a constitutional right or a defect seriously affecting the fairness of the trial.

Id. at 517.

Petitioner's claim demonstrates a denial or infringement of a constitutional or legal right, or a defect that seriously affected the fairness of the trial. The cognizability of a claim under Section 2255 does not depend on the "otherwise subject to collateral attack" grounds alone. Instead, even claims which may not pass muster under those grounds may well raise a

cognizable issue of a violation of a constitutional or legal right. Petitioner has alleged, in all of his claims, that he has suffered a denial and infringement of constitutional rights and legal rights under the Federal Rules of Evidence. Because his rights have been denied and infringed upon, thereby seriously affecting the fairness of his trial, the Petitioner should, therefore, be granted his motion to vacate his sentence under Section 2255.

In Shukwit v. United States, the court held that, in the context of a Section 2255 motion, "due process protects the right not to be sentenced on the basis of false information." 973 F.2d 903, 904 (11th Cir. 1992) (citing Parks v. United States, 832 F.2d 1244 (11th Cir. 1987)). The trial court improperly admitted evidence on Petitioner's prior convictions by a Florida state court for bank fraud and conspiracy to commit bank fraud, despite the fact that Petitioner did not testify nor put his character at issue. Admission of this evidence was a violation of the Federal Rules of Evidence, was highly prejudicial to the Petitioner, violated Petitioner's constitutional rights to a fair trial and due process of law under the Fifth Amendment, and was a fundamental defect which inherently resulted in a complete miscarriage of justice. See United States v. Addonzio, 442 U.S. 178, 185 (1979) (holding that the 'fundamental defect which inherently results in a complete miscarriage of justice' standard only applies to collateral attacks on convictions, not constitutional infringements); United States v. Velez-Rendon, 845 F.2d 304 (11th Cir. 1988). For these reasons, the district court's admittance of such evidence is proper grounds for a Section 2255 habeas corpus motion to vacate the Petitioner's sentence.

During the district court proceedings, the evidence of questionable state convictions was introduced for the purpose of discrediting Petitioner's character and showing propensity. In closing arguments before the jury, the prosecutor attempted to show that the Petitioner had a propensity for criminal acts by making reference to Petitioner's state convictions for conspiracy to commit bank fraud. (R1-1201). These convictions were also admitted into evidence as Government's Exhibit 5. However the

court's analysis of the prior convictions was cursory at best. Petitioner's counsel brought up the fact that the record of the prior conviction, which the Respondent wanted to publish to the jury, had been subsequently modified to state that the court was "withholding adjudication." Instead of looking into the records of the prior conviction, the court's only question was "Was he adjudicated guilty?" (R1-646, line 22). The Respondent's reply was "Yes, sir, and as it says on that document, at a time later in a motion to reduce the sentence, some later point in time, he came back and got probation and the judge withheld. Then later his probation was revoked and as the court knows, he's in jail right now serving the sentence. There is no question of adjudicated guilty, or he wouldn't be in jail right now." (R1-649, lines 14-17). There was no further inquiry into the previous conviction, besides the court's statement that " . . . I don't think there is any doubt about the similarity of the facts that it occurred. It's not like some similar act that the court needs to be satisfied that that actually occurred." Id.

The admission of Petitioner's state conviction was highly prejudicial to Petitioner's character and provides sufficient grounds for this Court to reverse the Court of Appeal's affirmation of the district court's denial of Petitioner's Section 2255 motion. It is generally true that an appellate court should not reverse the ruling of the court below unless the appellate court finds that the probative value of the evidence is outweighed by the prejudice to the defendant. Huddleston v. United States, 485 U.S. 681 (1988) (finding that evidence of defendant's prior television sales could go to the jury due to its probative value); see also United States v. Little, 562 F.2d 578 (8th Cir. 1977) (holding that when admission of evidence of other crimes is challenged on appeal, the task of an appellate court is to assess its relevancy and probative value and reverse where the probative value is outweighed by prejudice).

Furthermore, courts have also held that the introduction of a previous, unrelated act or alleged crime by the prosecution requires reversal where the defendant has not placed his or her character in issue. United States v. Peterson, 808 F.2d 969 (2d

Cir. 1987) (disallowing evidence of another allegedly stolen check to be entered against the defendant due to high prejudice and lack of similar act); see also United States v. Maestas, 546 F.2d 1177 (5th Cir. 1977); Abernathy v. United States, 402 F.2d 582 (8th Cir. 1968) (holding that the exclusionary rule is required, not because of lack of relevance, but because such evidence is highly prejudicial and is calculated to weigh heavily with the jury, causing the jury to prejudice the defendant due to his or her past conduct). Here, the Petitioner did not place his character at issue and did not testify. Thus, the district court's summary dismissal of Petitioner's motion to vacate should be reversed.

Admission of evidence of prior convictions where the defendant does not testify or place his character into issue is strictly regulated by Rule 404(b) of the Federal Rules of Evidence. Generally, Rule 404(b) holds evidence of prior crimes inadmissible for purposes of showing the bad character of the defendant. Specifically, this rule states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). While the rule permits this type of evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," this admissibility is also limited. In United States v. Tarricone, the court held that other act evidence is not admissible to prove knowledge or intent if defendant unequivocally relies on the claim that he did not commit the charged acts, rather than that he acted innocently or mistakenly. 996 F.2d 1414 (2d Cir. 1993). Therefore, the evidence of prior convictions could not have come in to prove knowledge or intent of Petitioner since he has unequivocally denied any wrongdoing from the beginning.

Furthermore, even if the prosecutor is able to link the evidence of the prior act to one of the above mentioned purposes, the Advisory Committee's Note to Rule 404(b) states that a "determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view

of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." Fed. R. Evid. 404(b), Advisory Committee Note; see also United States v. Morano, 697 F.2d 923 (11th Cir. 1983) (holding that exceptions listed in Rule 404(b) should be considered in weighing the balance under Rule 403 permitting exclusion of relevant evidence on grounds of prejudice between the relevancy of evidence of an accomplice's prior convictions and its prejudice). Rule 403 allows relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues . . . ." Fed. R. Evid. 403.

Besides having great prejudicial effect, the evidence introduced had minor probative value due to legal questionableness of the sentences, a lack of relevancy, and remoteness. Based on this minor degree of probative value, the high prejudicial effect outweighed the probative value and unduly influenced the jury, unfairly damaging Petitioner's case. Even if evidence of Petitioner's prior convictions of bank fraud and conspiracy to commit bank fraud were admitted for purposes other than to show propensity or bad character as specified in Rule 404(b), admittance of such evidence was improper since the prior convictions were improperly labeled as "felonies" thus causing unfair prejudice and confusion of the issues. In United States v. Sardelli, the court held that admission of evidence that defendant had allegedly committed prior crimes proven by various indictments constituted prejudicial error. 813 F.2d 654 (5th Cir. 1987).

Since there are material issues as to the legality of the sentences against the Petitioner and their labeling as "felonies," it is prejudicial error to have admitted this evidence. At the time of the trial, these convictions were not final since Petitioner was appealing the Florida state court's determination that such crimes were felonies under Florida law. The Florida statutes involved in the prior state conviction (Fla. Stat. §§659.53(1), 659.55), which deal with bank fraud, provided a penalty of, at most, a misdemeanor for the Petitioner. Section 659.53(1)

applies only to "[a]ny director, officer, or employee of a bank" and provides for a felony if such person is found guilty of fraud. Petitioner was not a "director, officer, or employee of a bank" at the time in question. Furthermore, the general penalty provision of the statute (§659.55) provides a penalty of misdemeanor, absent an intent to defraud. The state indictment under which Petitioner was arraigned did not even mention an intent to defraud.

The indictment and information charged that the alleged conspiracy occurred between April 3, 1975 and March 18, 1977. The Florida conspiracy statute stating that such acts were felonies (Fla. Stat. §833.04) was repealed effective July 1, 1975 and replaced with a statute (§777.04, effective October 1, 1975) making such offenses a misdemeanor. Thus, there were two separate statutes governing the penalties for conspiracy to commit a felony during the time that the alleged fraud took place. However, the first statute was only effective for two months of this period in question. Under Florida law, ambiguities in a criminal statute are to be resolved in favor of the defendant. Fiske v. State, 366 So.2d 423, 424 (Fla. 1978). Furthermore, Florida Statute §775.021(1) provides that "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

In the case at hand, the prosecutor published to the jury that Petitioner was convicted of the felonies of bank fraud and conspiracy to commit bank fraud. This evidence given to the jury was extremely prejudicial to Petitioner. These convictions were not final, since they were being appealed, and were highly questionable as to their legality. Therefore, the Court of Appeals and district court erred by not weighing the danger of undue prejudice against the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.

In addition to the minimal probative value due to the legality of the prior convictions, this evidence has low probative value because it is not relevant to the acts being charged. In United States v. Peterson, the court held that another allegedly stolen check could not be admitted as evidence against the defendant because its relevance was suspect. 808 F.2d 969 (2d Cir. 1987) The court further declared that admission of similar act evidence is an abuse of discretion if the other act is not sufficiently similar to the conduct at issue, or even if the chain of inferences necessary to connect evidence with the ultimate fact to be proved is unduly long. Id. For other wrongful acts of defendant to be admissible in criminal prosecution, evidence of other acts must be relevant to the material issue. United States v. Miller, 725 F.2d 462 (8th Cir. 1984); United States v. Lutz, 621 F.2d 940 (9th Cir. 1980), cert. denied 449 U.S. 859, 1093; United States v. Powell, 587 F.2d 443 (9th Cir. 1978); United States v. Jones, 425 F.2d 1048 (9th Cir. 1970), cert. denied 400 U.S. 823 (1971); United States v. Moody, 763 F.Supp. 589 (M.D. Ga. 1991) (finding that the test for admissibility of "extrinsic act" evidence is whether the evidence is relevant to issues other than the defendant's character, and whether its probative value is outweighed by its prejudicial effect). Furthermore, the government has the burden of demonstrating how evidence of other crimes, wrongs or acts committed by defendant is relevant to the issue in the case by articulating precisely the evidentiary hypothesis by which fact of consequence may be inferred from evidence of other acts. United States v. Hoque, 827 F.2d 660 (10th Cir. 1987) (holding that the prosecution must prove a clear and logical connection between alleged earlier offenses or misconduct and the case being tried). In this case, the prosecution did not prove any such relevance to the past convictions. Petitioner's prior state convictions involved an alleged bank loan fraud, which was factually unrelated and dissimilar to the charges involved in the 1983 federal convictions. As such, this evidence should not have been admitted since there was no relevancy to the acts for which Petitioner was on trial.

Finally, the acts of conspiracy and bank fraud for which Petitioner was charged by the state court in 1978, allegedly took place between April 3, 1975, and March 18, 1977, more than five years before the trial at issue in this appeal. Evidence of prior criminal acts should not be admitted if it is so remote that its probative value is minimal. United States v. Brookins, 919 F.2d 281 (5th Cir. 1990) (finding that the length of time separating the prior bad acts from the acts that are the subject of the prosecution is one factor properly considered in assessing the probative value of the prior bad acts evidence); United States v. Terebecki, 692 F.2d 1345 (11th Cir. 1982) (holding that the more remote the extrinsic offense, the less probative it is); United States v. Rubio-Gonzalez, 674 F.2d 1067 (5th Cir. 1982) (holding that evidence admitted under the rule governing other crimes' evidence to establish motive, plan, etc. is not controlled by the ten-year limit specified in Rule 609(b) of the Federal Rules of Evidence which governs impeachment of witnesses, and if prior crimes or acts admitted under the former are too remote in time, such may be substantially weakened in their probative value, weighing in favor of exclusion). Here, Petitioner's prior convictions were more than five years old and factually irrelevant. Under such circumstances, the Court of Appeals and district court abused their discretion by allowing evidence of prior convictions to be admitted.

The district court's admittance of evidence of prior convictions clearly violates the Federal Rules of Evidence, Rule 404. Since Petitioner did not testify and did not put his character at issue, evidence which is used to show propensity or bad character cannot be admitted. The probative value of evidence which is admitted to attempt to show "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," must be weighed against its prejudicial effect. The evidence admitted here was highly prejudicial and of minor probative value since it was highly questionable as to legality, irrelevant, and very remote. The district court erred in admitting such evidence and caused a "fundamental defect which inherently results in a complete miscarriage of justice." Houser, 508 F.2d at 512. By

not properly weighing the minimal probative value of this evidence against its extreme prejudicial effect, the district court violated Petitioner's constitutional right to a fair trial and due process of law under the Fifth Amendment. Admission of evidence of prior convictions where the defendant did not place his character at issue violates the defendant's constitutional rights of due process. Because of the minimum probative value of the prior evidence, its irrelevance and remoteness, and the facts that the characterization of these convictions as felonies was extremely questionable, admission of this evidence violated Petitioner's constitutional due process rights. As such, this is a cognizable claim under the constitutional or illegal violation clause of Section 2255.

II. Petitioner was Deprived of Effective Assistance of Counsel in Violation of Petitioner's Sixth Amendment Rights, Which is Proper Grounds for Petitioner's Section 2255 Motion.

Petitioner's attorney at trial, Frank Ragano, deprived Petitioner of effective representation, due to either incompetence or a wilful breach of duty toward Petitioner. Ragano's approach to Petitioner's case was inflammatory towards the jury and demonstrated incompetence in key areas of Petitioner's defense. Therefore, Petitioner was deprived of his Sixth Amendment right to effective assistance of counsel.

In order to be entitled to relief for a claim of ineffective assistance of counsel, petitioner has to be able to prove both that his trial counsel was ineffective or deficient and that there was a reasonable probability that the ineffectiveness altered the outcome of the trial, thus undermining the reliability of the jury's verdict. Strickland v. Washington, 466 U.S. 668, 690-96 (1984); Futch v. Dugger, 874 F.2d 1483, 1486 (11th Cir. 1989). In Futch, the court found that the petitioner was entitled to relief because the petitioner alleged facts, which if later were found to be true, would be sufficient for the court to find that counsel was ineffective. Id. It was also noted in Futch, that "this Court must accept as true factual assertions made by

petitioner for purposes of determining whether an evidentiary hearing is required. Id. Finally, the court noted that there is a reasonable probability that counsel's actions would change the result of the case if there is "a probability sufficient to undermine confidence in the outcome." Id., quoting Strickland v. Washington, 466 U.S. 668, 694 (1984).

Ragano's statements to the jury were extremely inflammatory and fell far below an objective standard of reasonableness, and but for this unprofessional error the result of the proceedings at trial would have been different. Accordingly, Petitioner should be granted his Section 2255 motion based on this ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 668, 694 (1984) (providing the standards which an ineffective assistance of counsel claim must establish); see generally Gideon v. Wainwright, 372 U.S. 335 (1963).

Ragano was repeatedly and deliberately inflammatory to the jury. In his closing arguments, Ragano stated to the jury that "I don't see how there could be any question that these defendants were involved in some scheme, to get money through the formation of these various corporations to reach their objective in acquiring these properties." (R1-1254). He further stated "[a] scheme can be good or can be bad. And if it was bad, they are as guilty as sin." (R1-1255). Ragano also stated that defendants "were down-right stupid." (R1-1258). at another point he concluded that "there is no argument about falsification of these documents." (R1-1259). The prejudicial effect of these statements can be seen from the closing remarks of the prosecutor: "They are as guilty as sin, as Mr. Ragano said." (R1-1352). Because of the inflammatory nature of his remarks to the jury and the unreasonableness of his advocacy, Petitioner was severely disadvantaged; so disadvantaged that the outcome of Petitioner's trial was effectively altered by his attorney's performance.

Ragano's professional performance also fell far below an objective standard of reasonableness in several specific legal

aspects of Petitioner's defense, and but for these unprofessional errors the result of the proceedings at trial would have been different. One of these areas is Ragano's handling of the issues involved with the statute of limitations.

Petitioner's convictions were obtained in violation of the applicable statute of limitations. Petitioner was charged with conspiracy to commit mail fraud under 18 U.S.C. §1341 and for transmittal in interstate commerce of a check in excess of five thousand dollars that were taken in fraud in violation of 18 U.S.C. §2314. The statute of limitations applicable to these crimes states that ". . . no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. §3282. The prosecutor's case against Petitioner involved the purchase of Morristown and Erie Railroad, Corp. ("M&E"), a privately held railroad. On February 5, 1976, Petitioner, who was then Chairman of the Board of Technology Transfer, Ltd., sent a letter to M&E discussing the purchase of the railroad. The prosecutor contended that this letter constituted the fraud with which the Petitioner was charged. However, the applicable statute of limitations for mail fraud runs from the date of mailing. United States v. Clevenger, 458 F.Supp. 354 (D. Tenn. 1978). To have successful met the statute of limitations, the indictment in this case had to have been returned by no later than February 5, 1981. Petitioner was not indicted until August 17, 1982, one and a half years after the five-year statute of limitations had run. In addition, the facts show that the transfer of cash to Florida of the alleged misappropriation of funds were all completed by July 1977, again more than five years before the date of the indictment. Mr. Ragano never proffered this defense in the Petitioner's behalf.

The general rule is that a violation of the statute of limitations by the prosecution is waived only be a defendant's guilty plea. Acevedo-Ramos v. United States, 961 F.2d 305 (1st Cir. 1992) (holding that defendant's guilty plea waived a statute of limitations defense as well as other non-jurisdictional

defects, even though defendant had previously raised that defense by motion and defense was not specifically waived at plea allocution, as would have been better practice). Had Petitioner possessed effective assistance of counsel, this statute of limitations bar to the proceedings would have unequivocally reversed the outcome of the trial court. Askins v. United States, 251 F.2d 909 (D.C.C. 1958) (finding that defendant charged with murder did not raise the defense at his trial or on appeal that the indictment was not found within three years from the date of alleged offense did not preclude the defendant thereafter from filing a motion in district court to set aside his conviction on such grounds under this section providing that a prisoner in custody under sentence claiming right to be released on the grounds that sentence was imposed in violation of federal law may move the court to vacate the sentence).

Petitioner's claim of ineffective assistance of counsel demonstrates a denial or infringement of the constitutional right to effective counsel under the Sixth Amendment, and this constitutes a defect seriously affecting the fairness of the trial. As noted above, the cognizability of a claim under Section 2255 does not depend on the "otherwise subject to collateral attack" grounds alone. Instead, even claims which may not pass muster under those grounds may well raise a cognizable constitutional issue. The Houser court specifically mentions the example of a claim of ineffective assistance of counsel. After noting that some courts have held claims of ineffective assistance of counsel as not cognizable, the Houser court continued: "[h]owever, lack of effective assistance of counsel also raises a constitutional issue cognizable in a collateral proceeding . . . ." 508 F.2d at 516. The court went on to list several particular grounds which have been held to be cognizable under Section 2255, including "the failure of counsel to take an appeal." Id. at 517-18.

Therefore, because Petitioner's conviction can be directly traced to ineffective assistance of counsel, the Petitioner has been wrongly convicted and the reliability of the jury's verdict has been undermined. Attorneys cannot be permitted to be inflammatory towards juries and clearly must consider the

statute of limitations defense at the beginning of a case. If these unprofessional practices are allowed to continue, the judiciary and advocates in general will suffer, as Petitioner has in this case.

CONCLUSION

This petition raises issues which were not dealt with in the district court's opinion. If proven these issues would represent a denial and infringement of the constitutional and legal rights of the Petitioner and seriously effect the rulings made at the trial. Based on the foregoing facts and arguments, Petitioner respectfully urges this Court to grant Petitioner's motion to vacate and set aside the sentence and convictions in this matter.

RESPECTFULLY SUBMITTED this 5th day of July, 1994, by:

/s/ Allen Wolfson

Allen Wolfson
Pro Se
202 West 400 South, Suite 100
Salt Lake City, UT 84101
Telephone: (801) 575-8311
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APPENDIX

APPENDIX

(A) United States Court of Appeals for the Eleventh Circuit (Case No. 92-3127)

(B) Judgment and Probation/Commitment Order

(C) Writ of Mandamus in Order to Compel District Court to Rule on Writ of Habeas Corpus

(D) Reduction of Sentence Order

(E) United States District Court decision against Petitioner

(F) Florida State Court decision against Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED U.S. COURT
OF APPEALS
Eleventh Circuit
Mar 4 1994
Miguel J. Cortez
Clerk

No. 92-3127
Non-Argument Calendar

D. C. Docket No. 82-68-Cr-T-21
and No. 88-1004-Civ-T-13A

ALLEN Z. WOLFSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(March 4, 1994)

Before ANDERSON and BLACK, Circuit Judges, and
JOHNSON,
Senior Circuit Judge

PER CURIAM:

Allen Z. Wolfson appeals pro se the district court's denial of his motion for post-conviction relief under 28 U.S.C.A. § 2255 (West 1971). After a jury trial, Wolfson was convicted of one court of conspiracy to commit fraud in violation of 18 U.S.C.A. § 371 (West 1966) and two counts of interstate transportation of money taken by fraud in violation of 18 U.S.C.A. § 2314 (West Supp. 1993). After his convictions were affirmed without opinion on direct appeal, United States v. Wolfson 729 F.2d 780 (11th cir.), cert. denied, 469 U.S. 846 (1984), Wolfson filed this motion to vacate under § 2255, alleging eleven claims.[1] The district court adopted a Magistrate Judge's Report and Recommendation and denied Wolfson's motion.

On appeal, Wolfson raises only two of the claims discussed below: (1) the district court improperly admitted evidence of a state criminal conviction; and (2) his trial lawyer rendered ineffective assistance of counsel. Accordingly, we deem the remainder of Wolfson's claims to be abandoned and do not consider them on appeal. See Atkins v. Singletary, 965 F.2d 952, 955 n.1 (11th Cir. 1992).

Wolfson first contends that the admission of a 1978 Florida conviction for bank fraud violated Federal Rules of

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[1] These claims were (1) the trial court improperly admitted evidence of a prior state bank fraud conviction (2) Wolfson's federal conspiracy conviction was obtained in violation of the applicable statute of limitations; (3) the jury was improperly instructed to consider whether Wolfson had committed illicit acts not charged in the indictment; (4) Wolfson was denied a fair trial because some of the jurors saw him in handcuffs; (5) a tape-recorded evidence; (6) the trial judge failed to instruct the jury on Wolfson's defense theory; (7) the government improperly withheld Brady and Jencks Act material; (8) key government witnesses committed perjury; (9) Wolfson's right to compulsory process for obtaining witnesses or evidence on his behalf was denied; (10) Wolfson's conviction subjected him to double jeopardy; and (11) Wolfson's trial and appellate lawyers rendered ineffective assistance by not raising all of the above issues and, in particular, by (a) failing to subpoena certain limitations defense, and (c) making comments during opening and closing argument that were "structured to intentionally convict" him.

Evidence 404(b) and compromised the fairness of the trial. In particular, he asserts that the prejudicial effect of this evidence outweighed its probative value, the evidence was offered solely to discredit his character and show his propensity to commit the crimes charged, and the legal basis for the state conviction was questionable.

Rule 404(b) provides that evidence of other crimes is inadmissible to prove the bad character of the defendant or to show that he acted in conformity therewith. Fed. R. Evid. 404 (b). Proof of other crimes or bad acts, however, are admissible for other purposes, including proof of criminal intent. Id. Whether the probative value of the evidence is substantially outweighed by its prejudicial effect is a matter committed to the sound discretion of the trial judge. United States v. Chong, 829 F.2d 1572, 1576 (11th Cir. 1987). Upon review of the record, we conclude that the trial judge did not err by admitting the challenged evidence because the prior conviction was relevant to the issue of Wolfson's criminal intent and because its probative value outweighed any unfair prejudice.

Wolfson next contends that his trial lawyer was ineffective because (a) he made "inflammatory" statements to the jury during opening and closing arguments and (b) he failed to raise a statute of limitations defense. To prevail on his ineffectiveness claim, Wolfson must show that (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced the defense to a degree that undermines the reliability of the jury's verdict. Strickland v. Washington, 466 U.S. 668,

690-96 (1984). The record reveals that Wolfson's attorney did not render ineffective assistance, and this claim fails.[2]

AFFIRMED

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[2] Wolfson also contends that he was entitled to an evidentiary hearing to prove his claims. A post-conviction relief motion may be dismissed without an evidentiary hearing if the petitioner's allegations, taken as true and viewed against undisputed facts in the record, conclusively show that the petitioner is not entitled to relief. Tejada v. Dugger, 941 F.2d 1551, 1555 (11th Cir. 1991), cert. denied, ____, U.S. _____, 112 S. Ct. 1199 (1992). As discussed above, the record establishes that Wolfson has failed to state a claim for relief in this collateral proceeding. The district court was therefore not required to hold an evidentiary hearing.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on the 16th day of July, 1987 pro se and with standby counsel, MARK PIZZO, Esq. AFFD and pleaded not guilty. There was a verdict of guilty. Count 1 - Conspiracy to make false statements for loans from federally insured bank in violation of 18.371. Count 3 - Conceal material fact in application for bank loan, in violation of 18:1001 & 2. Count 4 - False statement for bank loan, in violation of 18:1014 & 2.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:
Counts 1 3 and 4.

Imposition of sentence is hereby suspended and defendant placed on probation to commence upon his release from confinement for a period of FIVE (5) years, under the terms and general conditions of probation appearing on the reverse side of this Judgment and as a special condition of probation, defendant shall: (See Page 2).

In addition to the special conditions of probation imposed above, IT IS HEREBY ORDERED that the general conditions of probation set out on the reverse side of this Judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The Court orders commitment to the custody of the Attorney General and recommends: IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshall or other qualified officer.

CERTIFIED AS A TRUE COPY ON _____ By:
/s/_____.

UNITED STATES OF AMERICA)
v.) 86-359-Cr-T-13
Allen Z. Wolfson) (Cont'd from Page 1)
_____)

(1) Submit a personal balance sheet and income statement to his Probation officer under penalty of perjury every year. The income statement shall fully and truthfully reflect the defendant's sources of funds and expenditures.

(2) Not serve as officer or director of any corporation or play any managerial role in any corporation or partnership without prior approval of the Probation Officer in writing.

(3) Shall not share in the proceeds of any loan or enter into any express or implied agreement to share in such proceeds without prior approval of the Probation Officer and full and complete disclosure to the lender.

(4) Shall not directly or indirectly solicit any person to invest in any business enterprise which the defendant holds any proprietory interest directly or indirectly without the prior approval of the Probation Officer and full disclosure to the investor of the nature and extent of the defendant's interest.

(5) Shall not receive loans from corporations and partnerships, other than financial institutions, in amounts totalling more than $20,000 during any 12 month period without the prior approval of the Probation Officer.

SPECIAL ASSESSMENT.

Defendant shall pay an assessment to the United States in the amount of $150.00, pursuant to 18 U.S.C., Section 3013.

Dated July 16, 1987.

IN THE UNITED STATES
COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

ALLEN WOLFSON
-VS-
STATE OF FLORIDA CASE 88-1253-CIV-T-13A

WRIT OF MANDAMUS IN
ORDER TO COMPEL DISTRICT
COURT TO RULE ON WRIT
OF HABEAS CORPUS

Come now the petitioner Allen Wolfson operating pro se and informa Pauperes who asks the Appeals court to compel District Court for the Middle District of Florida Tampa to determine whether movant was convicted by statutes which are misdemeanor offenses and invalid as outlined in writ of Habeas Corpus which has been pending prior to June 30, 1988.

On March 17, 1978, Petitioner was convicted of the following supposed felony offenses in the circuit court of Tampa. Hillsborough County, Florida Count one conspiracy (FS 833.04) to violate (FS 659.53(1) and 639.55; Count two aiding and abetting violation of FS 659.53(1) and 659.55. Approximately 30 days after March 17, 1978 Wolfson's sentence was modified to withheld adjudication of guilt and placed on ten years probation, which in the State of Florida is not a conviction. On January 29, 1982 Wolfson violated his probation by being indicted for giving election contributions in excess of one thousand dollars to politicians and was sentenced to 10 years of imprisonment in the State of Florida for supposed felony offenses which are at best misdemeanors by statute. The indictment for excessive political contributions was not processed by the State of Florida.

On January 27, 1983, Wolfson in case also known as 88-1004-CIV-T-13A also known as 82-68-CR-T-13 was convicted in the Middle District of Florida of the following

counts. Count one conspiracy to commit mail fraud 1341. Count two and three interstate transportation. Petitioner's sentence was imposed to run consecutively to the State sentence. The District Judge George Carr sentenced Wolfson to ten years in prison and five years probation for a total of 15 years.

On or about March 15, 1984 in the Middle District of Florida, in Judge Carr's Court, Wolfson was coerced to pleading guilty in Case 83-90-CR-T-13 to two counts of a 15 count indictment and sentenced to 4 years probation. Prosecutor threatened that, if Wolfson did not plead that any additional time would run consecutive to the existing 25 years already imposed.

On or about March 15, 1984, the following events happened to Petitioner. In the case of State of Florida 83-90-CR-T-13 and 82-86-CR-T-GC both sentences on August 29, 1984 were reduced to two years probation to be run concurrent (see writ of habeas corpus for both the cases). On January 27, 1989 Wolfson was violated by information filed by the State of Florida (by same former Federal Prosecutors) which he plead guilty again to withheld adjudication. Even though the state charge was not a conviction the Federal Judge Geo Carr violated any sentenced Wolfson to 5 years in prison on Case 82-68-CR-T-GC. The same Court violated Wolfson in Case 83-90-CR-T-13 to two years concurrent to the five year term, even though probation had expired and warrant was filed after termination of probation.

On or about April 1988 Wolfson operating Pro Se discovered in Case 77-1902 State of Florida v. Allen Wolfson filed 3.850 Post Conviction Motions and exhausted his remedies in the State of Florida. The State of Florida, unwilling to admit that they intentionally and illegally incarcerated Wolfson for 25 months. It should be noted that while serving the state time, Wolfson was in custody of the U.S. courts in the Middle District almost the entire time. Wolfson would be given credit for this additional twenty-five months towards Case 88-1004-CIV-T-13A. On or about April 1988, Wolfson filed a Writ of Habeas Corpus with the Middle District of Florida Informa Pauperis and

was assigned a docket number 88-CIV-1253-T-13A (See Writ Exhibit "B"). The District Court is currently considering Writ of Habeas Corpus. Writ explains why felonies are in fact only misdemeanors by the same statute and why one statute had expired as outlined by the Florida Legislature.

On or about June 1988 in Case 82-68-CR-T-GC also known as 88-CIV-1004 and Case 83-90-CR-T-13 or 89-3008. Wolfson filed Writ of Habeas Corpus on both cases. Both cases were docket in forma pauperis. On October 3, 1988, in Case 83-90-CR-T-13, also known as 88-CIV-1284, Wolfson was denied his motion for Writ of Habeas Corpus by Judge George Carr, and immediately filed a notice of appeal which was docketed as of January 12, 1989 in Appellate Court.

In case 82-68-CR-T-GC also known as 88-CIV-1004 on October 11, the same District Judge George Carr issued an order that the United States Attorney should respond to Wolfson's Writ of Habeas Corpus no later than October 31, 1988. On or about November 15, 1988, Wolfson filed a motion with District Court that United States Attorney acquiesced by ignoring the order of District Court Judge George Carr to respond and that Wolfson's Writ in case 82-68-CR-T-GC (Also known as 88-CIV-1004) should be granted because the United States Attorney for the Middle District of Florida as of February 27, 1989 still had not responded to Wolfson's motion. Wolfson's Writ is still pending (see copy of Writ Exhibit "A".

The Court in case 83-90-CR-T-13, also known as 88-CIV-1284, or 89-3008 which is subject of an appeal. District Judge George Carr stated that Wolfson's Writ of Habeas Corpus was not factual and that it was conclusionary. District Court Judge George Carr was aware of all pending Writs of Habeas Corpus and should have not ruled on this until the other 2 Writs of Habeas Corpus motions were determined since 88-CIV-1253-T-13A and 88-CIV-1004-T were both filed before Writ, which is subject of appeal, was previously denied by same judge. The District Court and procedure require that each case require separate Habeas Corpus motions and were well aware that one

of the key issues was that the felonies which were at best only misdemeanors by the statutes of the State of Florida, enacted by the legislature which petitioner was convicted by (See Writ Wolfson v. State of Florida in Appendix Exhibit "B").

Petitioner asked Appellate Court to order district court to make determination jurisdiction and determine if felonies are misdemeanors in the domino effect on the case on appeal and all other cases.

Because of the judicial error in the case of State of Florida v. Allen Wolfson, which was allowed to be also published in 82-68-CR-T-13 in the District Court of Middle District of Florida, even though Wolfson did not testify, nor only should both cases be reversed but Wolfson should be released.

It is interesting to note that the state, (Assistant Attorney, Lauren Hafner Sewell) did not address in statutory problems in her response. She avoids the issue by taking the position that Wolfson waived all his rights since he did not appeal the original sentence and "he accepted the benefits "of the probation. The states attorney's estoppel theory is legally and technically weak.

Based on all the documents and careful examination of the statutes Wolfson without a doubt is entitled to a reduction of sentence or a new trial.

Petitioner asks that the Appeals Court order the District Court to make a determination since it is quite apparent that the court has had more than adequate time to file an order to vacate or set aside or correct the injustices of the State of Florida which are readily quite apparent.

Respectfully,
/s/ Allen Wolfson
03430-018 Mont. B
FPC Maxwell AFB
AL. 36112

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Writ of MANDAMUS was sent by the U. S. Mail on the 18th day of Sept, 1989 to the UNITED STATES DISTRICT COURT JUDGE GEORGE CARR, to the UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION TAMPA, FLORIDA 33602 AND LAUREEN HAFNER, Sewell Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammol Building, Tampa, Florida.

RESPECTFULLY,

/s/ ALLEN WOLFSON
03430-018
MONT. B
FPC MAXWELL AFB
ALABAMA 36112

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs. CASE NO. 82-68-CR-T-13

ALLEN Z. WOLFSON
RALPH MONROE

FILED
Clerk, U.S.
DISTRICT COURT
1984 AUG 28 PH 1:52
MIDDLE DISTRICT
OF FLORIDA
TAMPA, FLORIDA

ORDER

This cause comes before the Court on the Defendant Allen Z. Wolfson's Motion to Reduce Sentence pursuant to Rule 35, Fed. R. Cr. P. After careful consideration of the facts and in the interests of justice, the motion is GRANTED to the following extent: the prison sentences imposed in Counts I and II are reduced to time served and the period of probation imposed in Count III is reduced to two years.

DONE AND ORDERED in chambers in Tampa, Florida, this 28th day of August, 1984.

/s/ George C. Carr
UNITED STATES DISTRICT JUDGE

copies to: U.S. Attorney
U. S. Marshall
U. S. Probation
Robert H. MacKenzie, Esq.

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